No. 17-1011

IN THE

Supreme Court of the United States

BUDHA ISMAIL JAM, ET AL.,
Petitioners,

v.

INTERNATIONAL FINANCE CORPORATION,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Faced with a statutory provision that gives international organizations the "same" immunity from suit as foreign governments, the IFC urges this Court to give it "different"—and greater—immunity than such entities. Resp. Br. 22-23. But there is no escaping the IOIA's plain text. That language makes clear that the IOIA incorporates the *current* law of foreign sovereign immunity. Any other construction would not only fly in the face of Congress's choice of words, but also would wreak havoc on long-settled understandings that other incorporations-by-reference throughout the U.S. Code likewise require applying the referenced law as it exists today.

The IFC's arguments concerning Executive Branch practice and the policy goals of international organizational immunity also lack force. Ever since the Foreign Sovereign Immunities Act (FSIA) was enacted, the Executive Branch has taken the position that the IOIA's "same immunity" provision incorporates the FSIA. The United States reaffirms that view here, and it aligns with the Government's treatment of international organizations. That view is also consistent with sensible policy. Organizations that engage in commercial transactions should be subject to the same rules as other commercial actors, including foreign sovereigns. They certainly should not be singularly above the law.

I. STATUTORY CONSTRUCTION PRINCIPLES DICTATE THAT THE IOIA'S "SAME IMMUNITY" PROVISION TRACKS THE FSIA

In the IFC's telling, Congress meant to enshrine in the IOIA "an unchanging substantive rule" of virtually absolute immunity from suit for foreign sovereigns. Resp. Br. 31. But there is no indication that Congress thought it was enacting the very rule it rejected in the drafting process, *see* Petr. Br. 36-37, or that international organizations should ever receive—as the IFC's position would dictate—*greater* immunity than foreign sovereigns themselves. Instead, well-established principles of statutory construction demonstrate that Congress chose to tie such immunity to the immunity of foreign sovereigns.

A. The IOIA Tracks Current Foreign Sovereign Immunity Law.

1. Text

The IFC does not dispute that if sovereign immunity had been governed by statutory law when the IOIA was enacted, the IOIA's "same immunity" provision would require applying sovereign immunity law as it exists today. Indeed, the IFC concedes that Section 288d of the IOIA, which governs the immunity of officers and employees, incorporates the statutory law it references on a dynamic basis. Resp. Br. 38-39. But the IFC says that the reference canon does not apply to the "same immunity" provision at issue here because sovereign immunity law was governed in 1945 by a body of common law. *Id.* 25-28.

This argument—which neither the IFC nor anyone else has ever previously advanced—is deeply flawed.

a. It makes no sense to suspend the reference canon when a statute references a body of law that, at the time of enactment, was common law. Even more than statutory law, common law is inherently evolving (and subject to displacement by later legislative enactment). *See* Petr. Br. 19; *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 388-93 (1970). Courts applying the common law, therefore, have "always" had the duty "to interweave the new legislative policies with the inherited body of common-law principles." *Id.* at 392; *see also Miles v. Apex Marine Corp.*, 498 U.S. 19, 24 (1990) ("[L]egislation has always served as an important source of . . . common law . . . principles."). Congress surely has always expected the same principle to apply to incorporations by reference.

b. The IFC's proposed distinction also runs headlong into precedent. *Trammel v. United States*, 445 U.S. 40 (1980)—a case petitioners discussed, Petr. Br. 36-37, but the IFC ignores—provides a powerful example. That case addressed Federal Rule of Evidence 501, which provides that claims of privilege are governed by "[t]he common law." Fed. R. Evid. 501. The Court explained that the provision does *not* "freeze the law of privilege," but rather "leave[s] the door open to change." *Trammel*, 445 U.S. at 47. Similarly, in *FTC v. Groiler, Inc.*, 462 U.S. 19 (1983), the Court addressed a subsection of the Freedom of Information Act that exempts materials that "would not be available by law." 5 U.S.C. § 552(b)(5). The

Court held that the provision required applying "the current state of the law" regardless of whether the incorporated law was found in common law or a statute. *Groiler*, 462 U.S. at 27; *see also id.* at 34 n.6 (Brennan, J., concurring); *Sabbath v. United States*, 391 U.S. 585, 589 (1968) (interpreting 18 U.S.C. § 3109 "to incorporate fundamental values and the ongoing development of the common law").

American Steamboat Co. v. Chase, 83 U.S. 522 (1872), is even more on point. The so-called "saving to suitors" clause of the first Judiciary Act guarantees the right to seek "a common-law remedy"—in lieu of invoking federal admiralty jurisdiction—"where the common law is competent to give it." 1 Stat. 73, § 9 (1789) (now codified at 28 U.S.C. § 1333). When the plaintiff invoked the provision to seek damages based on "a State statute enacted subsequent to the passage of the Judiciary Act," the defendant objected on the ground that "the operation of the saving clause must be limited to such causes of action as were known to the common law at the time of the passage of the Judiciary Act." *Chase*, 83 U.S. at 533. This Court rejected the argument, invoking the "familiar principle[]" that a statutory reference to the "common law" includes later-enacted state statutes. *Id.* at 534-35.

The IFC invokes a line of cases involving the rule that "where Congress borrows *terms of art*" with particularized meanings at common law, the statute adopts those common law meanings. *Morissette v. United States*, 342 U.S. 246, 263 (1952) (emphasis added), *cited in* Resp. Br. 26. But the IFC is mixing

apples and oranges. As the language just quoted indicates, the canon the IFC invokes deals with "terms of art" in federal statutes, not directives to apply other general bodies of law. Even if the former freezes in time the specific common-law that is implicitly referenced (somewhat like a reference to a specific statutory provision does), that says nothing about how to construe a statute that references a general body of law. Only the reference canon does that.

c. The IFC's proposed distinction between references to bodies of statutory law and references to common law would also wreak havoc on numerous other federal laws. For example, everyone understands the Federal Tort Claims Act (FTCA), enacted the year after the IOIA, to incorporate state tort law on an evolving basis. *See* Petr. Br. 20 (citing cases). Adjudicating cases under increasingly antiquated common law from each state would cause serious headaches and risk mismanaging modern disputes. *See El Encanto, Inc. v. Hatch Chile Co.*, 825 F.3d 1161, 1164 (10th Cir. 2016) (Gorsuch, J.).

And the FTCA would be just the beginning. Consider the following statutes:

- the Equal Access to Justice Act (EAJA), making the United States liable for fees and expenses "to the same extent that any other party would be liable under the common law or under the terms of any statute," 28 U.S.C. § 2412(b);
- the federal wrongful death statute, which provides a right of action with respect to federal enclaves "as though the place were under the

jurisdiction of the State in which the place is located," 28 U.S.C. § 5001 (formerly codified at 16 U.S.C. § 457);

- the federal piracy statute, enacted in 1819, which criminalizes piracy "as defined by the law of nations," 18 U.S.C. § 1651.

Each of these statutes references what was, at least at the time of enactment, a body of common law. And each is understood to incorporate the referenced law on an evolving basis. *See, e.g.*, *Adamson v. Bowen*, 855 F.2d 668, 672 (10th Cir. 1988) (EAJA's references to "common law" and "statutes" both account for "the shifting nature of both bodies of law and [are] intended to encompass current law and subsequent changes"); *Vasina v. Grumman Corp.*, 644 F.2d 112, 117 (2d Cir. 1981) (wrongful death); *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 100 (1940) (reference in predecessor statute "keep[s state law] current," and ensures that "future statutes of the state are . . . part of the body of laws" that are incorporated); *United States v. Dire*, 680 F.3d 446, 467-68 (4th Cir. 2012) (piracy).

Many more statutes like these populate the U.S. Code. *See generally* Amicus Br. of Bipartisan Members of Congress 16-21. Congress, in fact, frequently relies on the long-settled rule that such statutes require applying the law as it exists today, not decades or centuries ago. *See id.* This Court should not upend that rule.

d. Two other aspects of the text of Section 288a(b) confirm that the provision incorporates foreign sovereign immunity law as it exists today.

First, the "same immunity" provision uses the present tense ("as is enjoyed"), which refers to the time suit is filed. Petr. Br. 23-24. The IFC cites a single case in which this Court construed a statute's use of the present tense to refer to law at a time in the past. Resp. Br. 29 (citing *McNeill v. United States*, 563 U.S. 816, 821 (2011), involving the Armed Career Criminal Act). But the Court did so in that case to avoid "the absurd results that would [have] follow[ed] from consulting *current* state law" to understand the conduct necessarily encompassed by a *past* conviction. *McNeill*, 563 U.S. at 822 (emphasis added). Even then, the Court held that the federal statute incorporated state law at the time of the defendant's conviction, not—as the IFC proposes here—when the federal statute was enacted. *Id.* at 820. In short, a statute's use of the present tense virtually always directs courts to law and facts at the time the suit is filed, and Section 288a(b) fits this mold. *See* Petr. Br. 23-24; Amicus Br. of United States (U.S. Br.) 14-15.

Second, Congress insisted that international organizations "enjoy the *same* immunity . . . as is enjoyed by foreign governments." 22 U.S.C. § 288a(b) (emphasis added). The IFC admits that the first Civil Rights Act used materially identical "the same . . . as is enjoyed" language to express continuing equality between black and white citizens rather than static equality as of 1866. Resp. Br. 29 n.10. But the IFC says that this language should be construed differently here because the IOIA's "purpose" was supposedly not to ensure equivalent treatment between international organizations and foreign governments.

Id. This reasoning is backwards. The fact that Congress chose a verbal formulation well understood to establish ongoing equality, and applied it to foreign governments and international organizations, confirms that this was indeed Congress's purpose. *See also* Petr. Br. 21-22.

2. Structure

The IOIA expressly confers absolute immunity against actions other than lawsuits, further reinforcing that Congress intended the "same immunity" provision to be construed differently. *See* Petr. Br. 26-27. None of the IFC's responses concerning the IOIA's structure has force.

a. The IFC repeats the D.C. Circuit's contention that the President's authority to withdraw, limit, or condition any of the IOIA's various immunities "makes sense only if Section 288a(b) establishes a fixed rule of virtually absolute immunity" from suit. Resp. Br. 33. This is incorrect. Section 288a(b) establishes the IOIA's ceiling respecting immunity from suit—today, absolute immunity for nearly all quasi-public acts but not for commercial or other private acts. The President can still lower or condition that immunity as he sees fit. Or, where a "broad[er]" immunity from suit is "warranted by [an] organization's circumstances," Resp. Br. 33, the member states can enshrine that immunity in the organization's charter or Congress can confer it by special statute. *See, e.g.*, *Brzak v. United Nations*, 597 F.3d 107, 112 (2d Cir. 2010) (giving effect to agreement granting absolute immunity to the United Nations); 22 U.S.C. § 286h (special statute implementing abso-

lute immunity for the International Monetary Fund (IMF)); *see also* U.S. Br. 26.

b. The IFC advances three other structural arguments the D.C. Circuit has never adopted—and that, to our knowledge, have never before been propounded by anyone. None is persuasive.

First, the IFC contends that Section 288a(b)'s waiver clause would be "superfluous" if the "same immunity" clause "incorporated by reference the *body* of foreign-state immunity law." Resp. Br. 31. Not so. The ability to waive an immunity or other protection is distinct from the substantive protection itself. *Cf. Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 786 n.4 (1991) (noting that issues of State's Eleventh Amendment immunity and its waiver of that immunity are "wholly distinct"). The waiver clause is therefore irrelevant here.

Second, the IFC argues that Congress would not have provided in Section 288a(c) that their "archives . . . shall be inviolable" unless international organizations are absolutely immune from suit. Resp. Br. 33; *see also id.* 43. But contrary to the IFC's suggestion, no court has held that this "archives" provision—as opposed to Section 288a(b)'s "all forms of judicial process" language—governs immunity from discovery. The cases cited by the IFC involve international agreements that protect not just "archives" but also "documents" from compelled disclosure. *Taiwan v. U.S. Dist. Ct.*, 128 F.3d 712, 718 (9th Cir. 1997).

Whatever the scope of the IOIA's "archives" provision, it is compatible with being subject to civil litigation. The IFC itself admits it "may be sued by purchasers of securities and other direct commercial counterparts." Resp. Br. 9. And all international organizations may *bring* lawsuits. *See* 22 U.S.C. § 288a(a)(iii). Organizations—including the IFC itself—produce discovery in such cases. *See, e.g.*, Mot. in Opp. to Pltf.'s Mot. for Extension of Time to Complete Discovery, *Osserian v. IFC*, No. 1-06-CV-0336 RWR, Doc. 41 (D.D.C. Sept. 10, 2009).

The archives of foreign sovereigns' diplomatic missions are similarly inviolable, yet litigation concerning those missions sometimes occurs. *E.g., Liberian E. Timber Corp. v. Republic of Liberia*, 659 F. Supp. 606, 608 (D.D.C. 1987). Indeed, the FSIA, too, contemplates discovery. *See* 28 U.S.C. § 1605(g).

Third, the IFC asserts that the FSIA's provisions governing attachment or execution of property, 28 U.S.C. §§ 1610-11, demonstrate that Congress did not believe that that statute's provisions regarding immunity from suit and other forms of judicial process would apply to international organizations. Resp. Br. 40-43. These provisions reveal just the opposite. While Section 1610 of the FSIA renders the property of foreign states subject to attachment or execution under certain circumstances, Section 1611 provides: "Notwithstanding the provisions of section 1610 of this chapter, the property of [international organizations] shall not be subject to attachment or any other judicial process" absent satisfaction of additional criteria. 28 U.S.C. § 1611. Congress would

not have enacted Section 1611 unless it assumed that Section 1610, by virtue of the IOIA, would have otherwise governed international organizations. *See, e.g.*, *Pott v. Arthur*, 104 U.S. 735, 736 (1881) ("A thing that is excepted . . . must necessarily belong to the class of things from which it is excepted").

The IFC also contends the FSIA should not apply to international organizations because it applies by its terms only to "foreign states"—a term that "does not include international organizations." Resp. Br. 41. This misunderstands how the reference canon works. The FSIA does not apply to international organizations by its own force. Rather, its provisions governing immunity from suit apply to international organizations by operation *of the IOIA*, which provides that such organizations "shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments." 22 U.S.C. § 288a(b).

Finally, the IFC professes confusion over whether the IOIA's "same immunity" provision incorporates the FSIA's rules regarding "foreign states" or those regarding foreign "agencies or instrumentalities." Resp. Br. 42 (citing 28 U.S.C. § 1603). The IOIA's reference to "foreign *governments*," 22 U.S.C. § 288a(b) (emphasis added), appears to incorporate both. The word "government" generally "refers collectively to the political organs of a country." Black's Law Dictionary (10th ed. 2014). And the term "foreign government" is used elsewhere in the U.S. Code to mean a state or an "agency" or "instrumentality" thereof. 15 U.S.C. § 78m(q)(1)(B); *see also* 5 U.S.C.

§ 7342(a)(2)(A); 22 U.S.C. § 611(e); 50 U.S.C. § 4565(a)(4). But the Court need not resolve any uncertainty in this case. The FSIA's rules governing "states" and "agenc[ies] and instrumentalit[ies]" are nearly identical, and the commercial activity exception is available here regardless. *See* 28 U.S.C. §§ 1603(a), 1605(a)(2).

3. Legislative History

a. Citing a few statements in the IOIA's legislative history, the IFC maintains that "international organizational immunity rested on *different* principles than foreign-state immunity." Resp. Br. 23 (emphasis added); *see also id.* 21-22, 53. In particular, the IFC contends that international organizational immunity is designed to guard against undue influence "from any one state." *Id.* 22. This argument has multiple problems.

First and foremost, legislative history cannot cancel out a statute's text. *See, e.g.*, *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994). The IOIA provides the "same" immunity from suit—nothing more, nothing less—as foreign governments. 22 U.S.C. § 288a(b). That means the two should be treated alike, not differently. *See* Petr. Br. 21-23.

Second, the IOIA's legislative history does not actually point to different immunity principles. The IFC ignores several congressional pronouncements that the goal of the statute was to accord international organizations the same protections as foreign states because they are "organizations made up of a number of foreign governments." Petr. Br. 32 (citation omitted) (collecting authority). Indeed, that was

the argument international organizations themselves pressed when advocating for an immunity statute. *See* Lawrence Preuss, *The International Organizations Immunities Act*, 40 Am. J. Int'l L. 332, 333-34 (1946). Applying the FSIA's rules is the only way to achieve that objective.

Third, even on its own terms, the concern that the United States could exert undue influence over international organizations that do not reserve absolute immunity through their own charters is overblown. The IFC's charter, like other organizations', deems it sufficient to deal with any undue-influence concerns by forbidding suits by member states. IFC Articles, art. 6, § 3. Besides, when a case involving an international organization is in U.S. court, ordinary choice-of-law rules apply. *See, e.g.*, *Do Rosário Veiga v. World Meteorological Org.*, 486 F. Supp. 2d 297, 305 (S.D.N.Y. 2007). (Here, for example, it may be that Indian law governs.) And the IFC never argues that U.S. courts cannot be trusted to apply those rules—and, when appropriate, substantive foreign law itself. Accordingly, there is no danger that mere litigation in U.S. courts might improperly thrust U.S. norms upon international organizations.

b. The IFC also claims that enforcing the IOIA's "same immunity" provision as written would contradict Congress's intention in 1945 to confer absolute immunity on certain organizations. Resp. Br. 34-35. But most of the organizations the IFC names—such as the IMF—are among those that have absolute immunity by virtue of their founding agreements, organization-specific statutes, or both; the IOIA's

"same immunity" provision is irrelevant to those organizations. Petr. Br. 3. By contrast, the IFC has identified no language in its own Articles of Agreement that suggest it was intended to have immunity from suits other than by member states. Indeed, the IFC's charter "was modeled on the World Bank's charter," BIO 31, and the Government understood from the beginning that the World Bank would "be subject to a suit." Constitutionality of the Bretton Woods Agreement Act, at 90 (1945).

That leaves the IFC's reliance on a comment in a House report saying that the IOIA was "substantially similar" to the 1944 British Diplomatic Privileges (Extension) Act. Resp. Br. 35-36. Considering that British law conferred a number of immunities and that U.S. law granted *no* immunities to international organizations before the IOIA, Petr. Br. 4, any statute granting significant immunities would have been "substantially similar" to British law. The overall comparison in the legislative history, therefore, proves little. It certainly cannot affect the specific directive in the IOIA's immunity-from-suit provision to track foreign sovereign immunity law over time.

B. Even if the IOIA Locked in Foreign Sovereign Immunity Law as of 1945, That Would Still Require Applying the FSIA Today.

The IFC does not dispute that *if* foreign sovereign immunity law in 1945 was procedural (that is, simply a rule of deference to the political branches), then applying that rule today would require applying the FSIA. The IFC insists, however, that when

the IOIA was enacted, a *substantive* federal common law rule conferred virtually absolute immunity upon foreign states. Resp. Br. 18.

As petitioners have shown, there was no such substantive rule. In 1945, it was "not for the courts to deny an immunity which our government has seen fit to allow, *or to allow an immunity on new grounds which the government has not seen fit to recognize*." *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) (emphasis added); *see also* Petr. Br. 37-40. This was a rule of procedural deference to the political branches, not substantive judicial policymaking. Either way of reading the IOIA, therefore, leads to the conclusion that its "same immunity" provision now incorporates the FSIA.

II. THE GOVERNMENT'S PAST AND CURRENT POSITIONS CONFIRM THAT THE "SAME IMMUNITY" PROVISION TRACKS THE FSIA

The IFC suggests that any indeterminacy in the IOIA should be informed by the Executive Branch's understanding of the statute. Resp. Br. 43-49. We agree. The Government's words and deeds confirm that the "same immunity" provision incorporates the FSIA.

1. For decades, the State Department has maintained that international organizational immunity from suit tracks the immunity of foreign sovereigns. *See* U.S. Br. 24-29; Petr. Br. 8-9 & n.2 (citing filings and documents from the administrations of Presidents Carter, George H.W. Bush, Clinton, and Obama). The Government reaffirms that position

here in a brief signed by the Solicitor General and the State Department's Legal Adviser.

Against this present and longstanding expression, the IFC points to a single footnote in a lower court brief. There, the Government recited *Atkinson*'s holding that the IOIA confers absolute immunity upon international organizations. Resp. Br. 49 (citing U.S. Br. 17 n.*, *EM Ltd. v. Republic of Argentina*, 473 F.3d 463 (2d Cir. Apr. 5, 2006) (No. 06-403)). But the meaning of the IOIA's "same immunity" provision was not even at issue in that case. The Government's citation, therefore, cannot blunt the import of everything before and since—namely, the Government's repeated explanation, in every instance where it has mattered, that the IOIA incorporates the FSIA. *See* U.S. Br. 28-29.

2. Contrary to the IFC's assertions, executive and congressional practice regarding specific international organizations also aligns with the Government's longstanding interpretation of the IOIA.

a. *United Nations (U.N.).* In 1970, the United States ratified the Convention on Privileges and Immunities of the U.N. (CPIUN), which affords the U.N. absolute immunity from suit. All agree, therefore, that the IOIA's "same immunity" provision has long been irrelevant to the U.N. *See* U.S. Br. 32; BIO 28. The IFC argues, however, that governmental actions regarding the U.N. before 1970 show it believed the IOIA provided absolute immunity to international organizations. The IFC is mistaken.

Before 1970, the U.N. Charter committed the United States to afford the U.N. only "such privileg-

es and immunities as are *necessary* for the fulfilment of its purposes." U.N. Charter, art. 105, § 1 (emphasis added). There is no evidence the Government thought following the restrictive theory of immunity was insufficient to fulfill that obligation. To the contrary, the 1952 Tate Letter generally afforded absolute immunity to covered entities unless they engaged in commercial activity. *See* Petr. Br. 7. And the IFC offers no evidence that the U.N. engaged in any commercial activity between the Tate Letter and U.S. ratification of the Convention that was critical to fulfill its objectives. Thus, ratification of the CPIUN did not materially change the U.N.'s immunity in any way that mattered.

More fundamentally, the IFC's conception of the pre-1970 state of affairs cannot be squared with the very existence of the CPIUN. If member states believed that the U.N. Charter *already* required member states to confer absolute immunity, the CPIUN would have been unnecessary. Accordingly, the better—and widely held—view of the Convention is that it "expand[ed] the U.N.'s immunity from functional immunity to something closer to absolute immunity." Farhana Choudhury, *The United Nations Immunity Regime: Seeking a Balance Between Unfettered Protection and Accountability*, 104 Geo. L.J. 725, 732 (2016); *see also* Kristen E. Boon, *The United Nations as Good Samaritan: Immunity and Responsibility*, 16 Chi. J. Int'l L. 341, 354 (2016).

b. *U.N. organizations.* The IFC next argues that the restrictive theory is insufficient for the United States to honor immunity provisions in certain U.N.

organizations' founding documents that were not self-executing. Resp. Br. 46. The IFC is incorrect

To begin, the IFC gives no good reason to believe the immunity provisions in the founding documents it references are not self-executing. The IFC simply cites the documents themselves and *Bond v. United States*, 134 S. Ct. 2077, 2084 (2014). But *Bond* concerned the Chemical Weapons Convention, and the nature of one treaty does not control whether a completely different treaty—or even a different provision in the same treaty—is self-executing. *Medellin v. Texas*, 552 U.S. 491, 508-11 (2008). This Court, moreover, has found some treaties constituting U.N. agencies to be self-executing. *See, e.g.*, *Warren v. United States*, 340 U.S. 523, 526 (1951) (International Labor Organization (ILO)).

Even if these provisions are not self-executing, there is still no reason to believe that applying the restrictive theory to those organizations renders the United States noncompliant. The founding documents of the U.N. Educational, Scientific and Cultural Organization (UNESCO), the ILO, and the Food and Agriculture Organization afford immunity only as "necessary" to fulfill these organizations' functions. Resp. Br. 46. The IFC does not argue that restrictive immunity provides insufficient protection for these organizations to function. Nor would any such argument hold water.

c. *International Centre for Settlement of Investment Disputes (ICSID)*. The IFC's arguments regarding ICSID likewise fall flat.

The ICSID Convention provides that the organization "shall enjoy immunity from all legal process, except when the Centre waives this immunity." Convention on the Settlement of Investment Disputes, § 6, art. 19 (Oct. 14, 1966). The IFC claims this provision is not self-executing. Resp. Br. 47. But no court has addressed that question. And the Executive Branch has treated the ICSID's immunity provision as effective without further U.S. action. Although the United States ratified the ICSID Convention in 1966, and the organization is headquartered in Washington, D.C., the President did not designate ICSID as an "international organization" entitled to IOIA immunity until 1977. Exec. Order No. 11966, 42 Fed. Reg. 4331 (Jan. 19, 1977). If the ICSID Convention were not self-executing, then ICSID would have had *no* immunity for these eleven years.

Congress's historical treatment of ICSID is in accord. In 1966, Congress enacted the Convention on the Settlement of Investment Disputes Act, "to facilitate the carrying out of the obligations of the United States" under the ICSID Convention. Pub. L. No. 89-532, 80 Stat. 344 (Aug. 11, 1966). But this law did not address immunity from suit. *See* 22 U.S.C. §§ 1650-1650a. The most plausible reason is that Congress, like the Executive Branch, understood the ICSID Convention's immunity provisions to be self-executing.

d. *Other organizations.* Various other international organizations as amici similarly claim that the IOIA's "same immunity" provision cannot mean what it says because that would be inconsistent with

U.S. interests. The United States itself, of course, disagrees. And for good reason. The status of all international organizations mentioned in the briefing appears as an Appendix to this brief; but in a nutshell: Some of the organizations have specific statutes[1] or ratified treaties[2] granting them immunity from suit, rendering the IOIA irrelevant. Others have charters that expressly incorporate the IOIA or functional immunity principles, with no evidence those are insufficient to safeguard U.S. interests.[3] Still others have no immunity provision in their charters.[4] For other organizations, the United States is not even a member state, so the U.S. has no obli-

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[1] 22 U.S.C. § 286h (IMF and International Bank for Reconstruction and Development); *id.* § 290i-8 (African Development Bank); *id.* § 283hh (Inter-American Investment Corporation); *id.* § 283g (International Development Bank); *id.* § 290k-10 (Multilateral Investment Guarantee Agency);; Pub. L. No. 89-369, 80 Stat. 72, § 9 (Mar. 16, 1966) (Asian Development Bank); Pub. L. No. 101-513, 104 Stat. 1979, 2035 (Nov. 5, 1990) (European Bank for Reconstruction and Development).

[2] Agreement Establishing the International Fund for Agricultural Development, art. 10, § 2(a) (June 13, 1976); North Pacific Marine Science Organization Convention, art. IX(ii) (Mar. 24, 1992).

[3] *See* Convention on the Organization of Economic Cooperation and Development, Supplementary Protocol No. 2 (Dec. 14, 1990); World Health Organization Const., arts. 66-67 (July 22, 1946).

[4] *See* Convention on Great Lakes Fisheries (Sept. 10, 1954); Convention between the United States of America and Canada for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea (Mar. 2, 1953).

gations to them, and they are generally ineligible for immunity under the IOIA.[5]

All told, the United States has carefully managed its obligations to, and participation in, international organizations. And now, after reviewing those commitments, the United States urges this Court to enforce the IOIA "same immunity" mandate as written. The Court should do so.

III. THE IFC'S POLICY ARGUMENTS ARE UNAVAILING.

Finally, the IFC musters a series of policy arguments to urge this Court to confer absolute immunity on international organizations. Whatever their merit, these arguments provide no basis to deviate from the IOIA's plain text. "The role of this Court is to apply the statute as it is written—even if [it] think[s] some other approach might accord with good policy." *Burrage v. United States*, 571 U.S. 204, 218 (2014) (quotations and alteration omitted). But even on their own terms, none of the IFC's arguments is persuasive.

1. Citing court decisions from other countries and some academic publications, the IFC contends that applying the restrictive theory of immunity to international organizations would be out of step with international norms. Resp. 22, 51-52. But the IOIA's

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[5] These include the Black Sea Trade and Development Bank, the Caribbean Development Bank, the Council of Europe Development Bank, and the Nordic Investment Bank. The U.S. also is not a member of the African Union and the U.N. Industrial Development Organization, but they are eligible for immunity pursuant to a special statute, 22 U.S.C. § 288f-2.

command is hardly outside the mainstream. Countries such as Italy, Greece, and Russia also apply the restrictive theory to international organizations. *See FAO v. INPDAI*, 87 ILR 1 (Court of Cassation 1982); Riccardo Pavoni, *Italy*, in The Privileges and Immunities of International Organizations in Domestic Courts 155, 155-71 (August Reinisch ed., 2013); Sergei Yu Marochkin, *Russia*, in The Privileges and Immunities of International Organizations in Domestic Courts 221, 232 (August Reinisch ed., 2013); Maria Gavouneli, *Greece*, in The Privileges and Immunities of International Organizations in Domestic Courts 131, 131-39 (August Reinisch ed., 2013). And leading U.S. scholars (some of whom previously served as top lawyers in the State Department) agree the restrictive theory is a "coherent, workable approach" that is "far more appropriate than a supposed rule of absolute immunity that was already on its way out in 1945"—and that virtually no country follows today. Amicus Br. of Professors of International Organization and International Law 20.

2. The IFC argues that allowing international organizations to be sued under the IOIA based on commercial conduct could frustrate their ability to carry out their missions. Resp. Br. 53-57. These arguments are unpersuasive as to both international organizations generally and the IFC in particular.

a. For starters, there are numerous ways besides the IOIA that international organizations limit their exposure to litigation. Many organizations, for instance, "enjoy immunity from suit under their founding treaties and thus need not rely on the immunity

conferred by the IOIA." BIO 27-28. The IMF is a good example, and the CPIUN follows the same approach. *Id.*; Petr. Br. 3. Additionally, organizations like the IFC may include provisions in their loan agreements that indemnify them against damages and legal expenses. *See* D. Ct. Dkt. 10-5, 10-6 Schedule 1, at 123, 132. If these options prove inadequate, organizations can change their charters or lobby Congress for a special immunity statute of their own.

b. The IFC also exaggerates by suggesting (Resp. Br. 58-59), that the IOIA subjects international organizations to suit in the United States for *all* commercial conduct. The FSIA's commercial activity exception requires commercial conduct at issue to have a sufficient nexus to the United States. 28 U.S.C. §§ 1603, 1605(a)(2); *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 396 (2015); *see also* U.S. Br. 32-33. This limitation and others explain why the "flood" of litigation the IFC imagines, Resp. Br. 60, has not materialized in the Third Circuit and will not materialize elsewhere. *See Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc.*, 137 S. Ct. 2042, 2054 (2017) (dismissing similar concern as "likely . . . overstated").

c. The IFC falls back on the assertion that "[e]ven one such suit" would irreparably chill its lending activities. Resp. Br. 56. But this is manifestly untrue. The IFC's own Articles of Agreement include a "broad" provision *allowing* lawsuits against it, Pet. App. 31a—a provision the IFC describes as allowing it to be sued by "direct commercial counterparts." Resp. Br. 9; *see also, e.g., Osseiran v. IFC*, 552

F.3d 836 (D.C. Cir. 2009); *Oliver Res. PLC v. IFC*, 62 F.3d 128 (5th Cir. 1995). And yet the IFC continues to operate effectively. Moreover, other lending institutions—private and public—are able to perform their core functions despite the fact that they are subject to suit for commercial malfeasance.

That leaves the IFC's contention that lawsuits "like this one" are particularly problematic. Claims seeking to hold the IFC liable for violating its "self-imposed" sustainability standards, the IFC argues, could cause it to abandon those standards. Resp. Br. 54-56. But even assuming the IFC's management could abandon its mission, this contention misapprehends petitioners' complaint. Petitioners seek to hold the IFC liable for violating tort and contract law. *See* Petr. Br. 11. Violations of an organization's own internal standards might sometimes be relevant evidence supporting such a claim—just as a private business's breach of its internal protocols might. But petitioners' claims ultimately turn on external law, not those standards.

3. The IFC's foreign relations objections are similarly misconceived. While the supervisory decision-making at issue here occurred in the United States, the IFC complains that applying the restrictive theory would allow U.S. courts to adjudicate cases involving conduct that occurred abroad. Resp. Br. 55-57. But provided the defendant has sufficient contacts to the United States, there is nothing necessarily illegitimate about claims "based on activities and events elsewhere." *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011). Similar principles apply in

breach-of-contract cases. *See, e.g.*, *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992).

Lest there be any doubt, in the Tate Letter and the FSIA, the Executive Branch and Congress determined that it is appropriate in circumstances equivalent to those here for U.S. courts to sit in judgment *of foreign sovereigns*. If that is tolerable, then surely allowing lawsuits involving the commercial activities of international organizations is acceptable. *See* U.S. Br. 32-34.

Moreover, some international organizations execute projects entirely within the United States. *See* Petr. Br. 3. Yet the IFC and its amici seek a rule that would place misconduct during even those projects—no matter how egregious, and no matter how harmful to U.S. citizens and interests—completely beyond the reach of the law. Congress wisely rejected any such approach, determining in the IOIA that no misdeeds that would subject a foreign sovereign to suit should be immunized with respect to international organizations. The Executive agrees. This Court should enforce that statute here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

International Organizations Mentioned in Briefing

ORGANIZATION	IMMUNITY	IOIA DESIGNATION
African Development Bank[1]	Provided by statute, 22 U.S.C. § 290i-8	Exec. Order No. 12403, 48 Fed. Reg. 6087 (Feb. 8, 1983)
African Development Fund	Provided by statute, 22 U.S.C. § 290g-7	Exec. Order No. 11977, 42 Fed. Reg. 14,671 (Mar. 14, 1977)
African Union	The United States is not a party	Exec. Order No. 13377, 70 Fed. Reg. 20,263 (Apr. 13, 2005)
Asian Development Bank	Provided by statute, 80 Stat. 72, § 9	Exec. Order. No. 11334, 32 Fed. Reg. 3933 (Mar. 7, 1967)
Black Sea Trade and Development Bank	The United States is not a party	N/A
Border Envi-	Provided by	Exec. Order

[1] The Nigerian Trust Fund—*see* Amicus Br. of International Bank for Reconstruction and Development 1—is a component of the African Development Bank and its immunities are tied to that afforded the Bank, *see* Agreement Establishing the Nigerian Trust Fund, art. XV.

ronmental Co-operation Commission	statute, 107 Stat. 2057, § 542	No. 12904, 59 Fed. Reg. 13,179 (Mar. 16, 1994)
Caribbean Development Bank	The United States is not a party	N/A
Council of Europe Development Bank	The United States is not a party	N/A
European Bank for Reconstruction and Development	Provided by statute, 104 Stat. 1979, 2034	Exec. Order No. 12766, 56 Fed. Reg. 28,463 (June 18, 1991)
European Space Agency	The United States is not a party	Exec. Order No. 11318, 31 Fed. Reg. 15,307 (Dec. 5, 1966); Exec. Order No. 11351, 32 Fed. Reg. 7561 (May 22, 1967); Exec. Order No. 11760, 39 Fed. Reg. 2343 (Jan. 17, 1974); Exec. Order No. 12766, 56 Fed. Reg. 28,463 (June 18, 1991)

Food and Agriculture Organization (FAO)	No implementing legislation or ratified treaty, but agreement only requires members to provide immunities "insofar as it may be possible under [their] constitutional procedure," FAO Const., art. XVI, § 2	Exec. Order No. 9698, 11 Fed. Reg. 1809 (Feb. 19, 1946)
Great Lakes Fishery Commission	No immunity provision in agreement	Exec. Order No. 11059, 27 Fed. Reg. 10,405 (Oct. 23, 1962)
Inter-American Development Bank	Provided by statute, 22 U.S.C. § 283g	Exec. Order No. 10873, 25 Fed. Reg. 3097 (Apr. 8, 1960); Exec. Order No. 11019, 27 Fed. Red. 4145 (Apr. 27, 1962)
Inter-American Investment Corporation	Provided by statute, 22 U.S.C. § 283hh	Exec. Order No. 12567, 51 Fed. Reg. 35,495 (Oct. 2, 1986)

Inter-American Tropical Tuna Commission	No immunity provision in agreement	Exec. Order No. 11059, 27 Fed. Reg. 10,405 (Oct. 23, 1962)
International Bank for Reconstruction and Development (World Bank)	Ratified treaty, 1 U.S.T. 1942	Exec. Order No. 9751, 11 Fed. Reg. 7713 (July 11, 1946)
International Boundary and Water Commission	No immunity provision in agreement	Exec. Order No. 12467, 49 Fed. Reg. 8229 (Mar. 2, 1984)
International Centre for Settlement of Investment Disputes	Presumed to be self-executing, *see* Reply Br. 19	Exec. Order No. 11966, 42 Fed. Reg. 4331 (Jan. 19, 1977)
International Cotton Institute	Ratified treaty, 17 U.S.T. 83	Exec. Order No. 11283, 31 Fed. Reg. 7667 (May 27, 1966)
International Criminal Police Organization (Interpol)	No immunity provision in agreement	Exec. Order No. 12425, 48 Fed. Reg. 28,069 (June 16, 1983); Exec. Order No. 12971, 60 Fed. Reg. 48,617

		(Sept. 15, 1995); Exec. Order No. 13524, 74 Fed. Reg. 67,803 (Dec. 16, 2009)
International Finance Corp.	Provided in part by statute, 22 U.S.C. § 282g	Exec. Order No. 10680, 21 Fed. Reg. 7647 (Oct. 2, 1956)
International Food Policy Research Institute	No immunity provision in agreement	Exec. Order No. 12359, 47 Fed. Reg. 17,791 (Apr. 22, 1982)
International Fund for Agricultural Development	Ratified treaty, 28 U.S.T. 8435	Exec. Order No. 12732, 55 Fed. Reg. 46,489 (Oct. 31, 1990)
International Fusion Energy Organization	No implementing legislation or ratified treaty, but agreement only requires "such privileges and immunities as are necessary for the exercise of its functions," T.I.A.S. 07-1024	Exec. Order No. 13451, 72 Fed. Reg. 224 (Nov. 21, 2007)

International Labor Organization	Ratified treaty, 49 Stat. 2712; *see also* 22 U.S.C. § 288f-2	Exec. Order No. 9698, 11 Fed. Reg. 1809 (Feb. 19, 1946)
International Monetary Fund	Provided by statute, 22 U.S.C. § 286h	Exec. Order No. 9751, 11 Fed. Reg. 7713 (July 11, 1946)
International Pacific Halibut Commission	No immunity provision in agreement	Exec. Order No. 11059, 27 Fed. Reg. 10,405 (Oct. 23, 1962)
International Telecommunications Satellite Organization (INTELSAT)[2]	Repealed in light of privatization, 47 U.S.C. §§ 701-744	Exec. Order No. 11718, 38 Fed. Reg. 12,797 (May 14, 1973); Exec. Order No. 11966, 42 Fed. Reg. 4331 (Jan. 19, 1977)
International Union for Conservation of Nature and Natural Resources	No immunity provision in agreement	Exec. Order No. 12986, 61 Fed. Reg. 1693 (Jan. 18, 1996)
Multilateral	No implement-	Exec. Order

[2] The Interim Communications Satellite Committee, *see* Amicus Br. of International Law Experts 23 n.6, is part of INTELSAT. *See* 15 U.S.T. 1705, art. IV(a), (b).

Investment Guarantee Agency (MIGA)	ing legislation or ratified treaty, but agreement allows MIGA to be sued in the United States, *see* MIGA Convention, art. 44	No. 12647, 53 Fed. Reg. 29,323 (Aug. 2, 1988)
Nordic Investment Bank	The United States is not a party	N/A
North American Development Bank	Provided by statute, 107 Stat. 2057, § 542	Exec. Order No. 12904, 59 Fed. Reg. 13,179 (Mar. 16, 1994)
Organization for European Economic Cooperation (OECD)	Ratified treaty, 12 U.S.T. 1728	Exec. Order No. 10133, 15 Fed. Reg. 4159 (June 27, 1950)
Pacific Salmon Commission	Ratified treaty, 1985 U.S.T. LEXIS 57, but no immunity provision in agreement	Exec. Order No. 12567, 51 Fed. Reg. 35,495 (Oct. 2, 1986)
United Nations (U.N.)	Ratified treaty, 21 U.S.T. 1418	Exec. Order No. 9698, 11 Fed. Reg. 1809 (Feb. 19, 1946)

U.N. Educational, Scientific, and Cultural Organization	U.S. has withdrawn effective Dec. 31, 2018	Exec. Order No. 9863, 12 Fed. Reg. 3559 (May 31, 1947)
U.N. Industrial Development Organization	Provided by statute, 22 U.S.C. § 288f-2	Exec. Order No. 12628, 53 Fed. Reg. 7725 (Mar. 8, 1988)
U.N. Relief and Rehabilitation Administration	Organization is defunct, *see* Fernando Chang-Muy, ***International Refugee Law in Asia***, 24 N.Y.U. J. In'tl L. & Politics 1171, 1172 (1992)	Exec. Order No. 9698, 11 Fed. Reg. 1809 (Feb. 19, 1946)
United States-Mexico Border Health Commission	Ratified treaty, 2000 U.S.T. Lexis 199	Exec. Order No. 13367, 69 Fed. Reg. 77,605 (Dec. 21, 2004)
World Health Organization	No implementing legislation or ratified treaty, but agreement only requires "such privileges and immunities as may be neces-	Exec. Order No. 10025, 13 Fed. Reg. 9361 (Dec. 30, 1948)

	sary for the fulfilment of its objective and for the exercise of its functions," WHO Const., art. 67(a)	
World Intellectual Property Organization	Ratified treaty, 1970 U.S.T. Lexis 597	Exec. Order No. 11866, 40 Fed. Reg. 26,015 (June 18, 1975)
World Tourism Organization	Ratified treaty, 1970 U.S.T. Lexis 616	Exec. Order No. 12508, 50 Fed. Reg. 11,837 (Mar. 22, 1985)
World Trade Organization	Provided by statute, Pub. L. No. 103-465, 108 Stat. 4809 (1994)	Exec. Order No. 13042, 62 Fed. Reg. 18,017 (Apr. 9, 1997)